INDEX

Subject Index

	Page
Petition for writ of certiorari	1
Statement of the matters involved	2
Jurisdiction	4
Constitutional provisions involved	5
Question presented	6
Reasons relied on for the allowance of the writ	9
Brief in support of petition	9
Preliminary statement	9
Argument	9

Table of Cases Cited

Barrett v. *Cady*, 78 N. H. 60	11
Binney v. *Long*, 299 U. S. 280	7, 12, 13
Burtman v. *Butman*, 94 N. H. 412	2, 11
Campbell v. *California*, 200 U. S. 87	7, 12
Carter v. *Craig*, 77 N. H. 200	7, 10
Cumberland Coal Co. v. *Board of Revision*, 284 U. S. 23	14
Caskey v. *State*, 93 N. Y. 438	7, 10
Coolidge v. *Long*, 282 U. S. 582	13
Keeney v. *New York*, 222 U. S. 524	7, 12, 13
Magoun v. *Illinois Tr. & Sav. Bank*, 170 U. S. 283	7, 12
Schlesinger v. *Wisconsin*, 270 U. S. 230	7, 12
State v. *Haley*, 94 N. Y. 69	7, 10
Stebbins v. *Riley*, 268 U. S. 137	13
Sioux City Bridge Co. v. *Dakota County*, 260 U. S. 441	14
Williams v. *State*, 81 N. Y. 341	7, 10

Statutes Cited

Constitution of New Hampshire:	
Article V of Part II	5, 6
Article VI of Part II	5, 6
Article 12 of the Bill of Rights	5
Constitution of the United States, Fourteenth Amendment	5
Inheritance Tax Law of New Hampshire (R. L., c. 87, s. 1)	4, 10
Judicial Code, section 237 (b); 28 U.S.C. 344(b)	4
Laws of the State of New Hampshire, 1947, c. 90	3

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 883

J. S. BUTNAM AND STANLEY M. BURNS, EXECUTORS OF THE ESTATE OF ABRAHAM BURTMAN,

Petitioners,

vs.

STATE OF NEW HAMPSHIRE

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The Executors of the Estate of Abraham Burtman respectfully petition for a writ of certiorari to the Supreme Court of New Hampshire to review the orders of said Court, entered on February 1, 1949 (R. 18) and March 23, 1949 (R. 34) dismissing the petition of the Executors filed in the Probate Court of Strafford County.

The opinion of the Supreme Court of New Hampshire (R. 18) is reported at 63 Atlantic 2d 798.

A

Statement of the Matters Involved

Abraham Burtman, a resident of Farmington, N. H., died on March 26, 1946. His will was duly approved and allowed in Strafford County Probate Court on April 2, 1946. The petitioners, J. S. Butman and Stanley M. Burns, are the surviving executors of his will.

Abraham Burtman left his wife, Avelyn Frey Burtman, the sum of Fifty Thousand Dollars ($50,000) by clause 2 of his will. She had agreed in an antenuptial agreement dated February 23, 1945, that she would accept that amount in full payment and satisfaction of her widow's distributive share should she survive Abraham Burtman. However, on or about July 1, 1946, Avelyn Frey Burtman filed a waiver of the provisions of the will of Abraham Burtman and claimed a widow's distributive share of the estate under the laws of the State of New Hampshire. On that date she also appealed from an order of the Probate Court granting a license to the executors to sell shares of the H. O. Rondeau Shoe Co., which formed part of the estate.

Extended negotiations were carried on between the parties and their respective attorneys. A compromise agreement was finally reached under the terms of which the executors paid Avelyn Frey Burtman the sum of One Hundred Thousand Dollars ($100,000) from the assets of the estate in addition to her legacy of Fifty Thousand Dollars ($50,000). She also received certain other property from other sources in the settlement. *Burtman* v. *Butman,* 94 N. H. 412. There were disputed questions of law and of fact involved in the claim of Avelyn Frey Burtman against the estate. In view of the disputed issues the settlement made by the executors was reasonable and beneficial to the estate and was so found by the Probate Court.

The residue of the estate of Abraham Burtman was left in trust for charitable purposes under article 26 of the will. Before reduction due to the compromise agreement the residue amounted to $622,617.98, upon which the Legacy and Succession Tax Department of New Hampshire assessed a tax under R. L., c. 87 of $52,922.52. The amount which would come to this residuary trust was reduced by One Hundred Thousand Dollars ($100,000) by reason of the payment made by the executors to Avelyn Frey Burtman. The Legacy and Succession Tax Department of New Hampshire levied an inheritance tax on this One Hundred Thousand Dollars ($100,000) by including it in the taxable estate of Abraham Burtman. Of the amount received by the widow, the Legacy and Succession Tax Department exempted only the Fifty Thousand Dollars ($50,000) bequeathed to her by the will. The executors contended that no tax should be assessed upon the One Hundred Thousand Dollar ($100,000) payment. The tax fell on the trustees of the charitable trust who were thereby ordered to pay an inheritance tax upon a legacy of One Hundred Thousand Dollars ($100,000) which they did not receive.

The executors brought a petition in the Strafford County Probate Court appealing from the assessment of the legacy and succession tax on the estate of Abraham Burtman by the Legacy and Succession Tax Department of the State of New Hampshire. An answer was filed by the Assistant Attorney General of the State of New Hampshire, appearing for the Legacy and Succession Tax Department. On a reserved case the following question of law was certified to the Supreme Court of the State of New Hampshire, under the provisions of c. 90, Laws of 1947 of the State of New Hampshire:

> "Under the foregoing facts, is the Legacy and Succession Tax Department of the State of New Hamp-

shire correct in exempting only the sum of Fifty Thousand Dollars ($50,000), the amount of the legacy payable to the widow by Clause 2 of the will, or should it exempt in addition the sum of One Hundred Thousand Dollars ($100,000) which the widow received under the terms of the compromise?'' (Record p. 5).

The Supreme Court of the State of New Hampshire dismissed the petition by a divided decision, with Chief Justice Branch dissenting. A motion for rehearing was filed by the executors and was denied.

B

Jurisdiction

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code as amended; 28 U. S. C. 344(b). The petitioners contend that the Inheritance Tax Law of the State of New Hampshire (R. L., c. 87, s. 1), as construed by a majority of the New Hampshire Supreme Court is unconstitutional, since a violation of the Fourteenth Amendment of the United States Constitution. The Inheritance Tax Law subjects to a tax

> ''All property within the jurisdiction of the State . . . belonging to domiciliaries of the State . . . which shall pass by will, or by the laws regulating intestate succession . . . to any person . . . except . . . the . . . wife.''
>
> R. L., c. 87, s. 1, as amended by Laws of 1945, c. 3, s. 1 and c. 144, s. 1.

The order of the Supreme Court of New Hampshire dismissing the petition was entered on February 1, 1949. On February 10, 1949, the executors moved for an extension of time in which to file a motion and brief for rehearing. On February 14, the motion of the executors for an extension of time was granted and the time was extended until Febru-

ary 22, 1949. On February 21, 1949, the petition for rehearing and brief in support thereof were filed. The petition for rehearing was thereafter considered and was denied by the Court on March 23, 1949.

The order of the Supreme Court of New Hampshire dismissing the petition did not become a judgment until after the petition for rehearing was denied. The applicable New Hampshire statute provides that the certificate of the Supreme Court of New Hampshire shall not be filed with the Court below until thirty days after the order made in the Supreme Court of New Hampshire. R. L., c. 369, s. 14. A certificate was not delivered from the Supreme Court to the Probate Court until the disposition of the motion for rehearing. This appeal is brought within ninety days of the disposition of the motion for rehearing.

C

Constitutional Provisions Involved

The constitutional provisions involved are the Fourteenth Amendment of the Constitution of the United States; Article 12th of the Bill of Rights of the Constitution of New Hampshire, Article V of Part II of the Constitution of New Hampshire and Article VI of Part II of the Constitution of New Hampshire.

The Fourteenth Amendment of the United States Constitution provides in Section 1:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 12 of the Bill of Rights of the New Hampshire Constitution provides:

> "Every member of the community has a right to be protected by it, in the enjoyment of his life, liberty, and property; he is therefore bound to contribute his share in the expense of such protection, and to yield his personal service when necessary, or an equivalent. But no part of a man's property shall be taken from him, or applied to public uses, without his own consent, or that of the representative body of the people. Nor are the inhabitants of this state controllable by any other laws than those to which they, or their representative body, have given their consent."

Article 5 of Part II of the New Hampshire Constitution grants to the general court the power "to impose and levy proportional and reasonable assessments, rates, and taxes, upon all inhabitants within, the said state; and upon all estates within the same."

Article 6, Part II of the Constitution of New Hampshire, provides:

> "The public charges of government, or any part thereof, may be raised by taxation upon polls, estates, and other classes of property, including franchises and property when passing by will or inheritance; and there shall be a valuation of the estates within the state taken anew once in every five years, at least, and as much oftener as the general court shall order."

D

Question Presented

The question presented is whether the State of New Hampshire has the power to levy an inheritance tax against

legatees upon property which was not received by them from the estate of the deceased but which was paid by the executors of the estate to others in order to compromise a contest against the decedent's will.

E

Reasons Relied On for the Allowance of the Writ

I. *The New Hampshire Inheritance Tax Law as construed and applied by a majority of the New Hampshire Supreme Court is unconstitutional since it amounts to a taking of property without due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.*

The New Hampshire Inheritance Tax is levied upon the interest of the legatee or distributee. It is a tax upon the right to succeed to property passing by will or inheritance. *Carter* v. *Craig*, 77 N. H. 200, 205 (90 A. 598); *Williams* v. *State*, 81 N. H. 341, 355 (125 A. 661); *Caskey* v. *State*, 93 N. H. 438, 442 (43 A(2) 768); *State* v. *Haley*, 94 N. H. 69, 73 (45 A(2) 533). It is not a tax upon the estate of the decedent and in this respect it is to be distinguished from the Federal Estate Tax.

An inheritance tax which is arbitrary, unreasonable and unequal is in violation of the Fourteenth Amendment of the United States Constitution. *Magoun* v. *Illinois Tr. & Sav. Bank*, 170 U. S. 283, 300; *Campbell* v. *California*, 200 U. S. 87; *Keeney* v. *New York*, 222 U. S. 524; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Binney* v. *Long*, 299 U. S. 280. In *Magoun* v. *Ill. Tr. & Sav. Bank, supra*, at p. 300, the Court said that the Fourteenth Amendment requires that the law imposing the tax "shall operate on all alike under the same circumstances." In *Binney* v. *Long, supra*, the Court

held that it was unconstitutional to single out for taxation, a class of remaindermen from all those similarly situated.

In the case at bar the residuary legatees are required to pay a tax on property which they did not receive and over which they never had any control. The residuary legatees did not participate in the settlement negotiations which resulted in the compromise agreement. The agreement was made by the executors alone. It was then found by the Probate Court to be reasonable and beneficial to the estate. The residuary legatees are not being taxed equally with other persons in the same class as themselves. They are required to pay a higher tax than other legatees receiving the same amount from the same size estate. There is no sound reason for this classification. They have been subjected to unfair discrimination. The taxing law as applied in this case by the Supreme Court of New Hampshire is arbitrary and unreasonable.

WHEREFORE, your petitioners pray that a writ of certiorari be issued under the seal of this Court, directed to the Supreme Court of New Hampshire, to the end that this cause may be reviewed and determined by this Court; that the order of the said Supreme Court of New Hampshire be reversed by this Court; and for such other and further relief as to this Court may seem proper.

Respectfully submitted,

STANLEY M. BURNS,
Strafford Bank Building,
Dover, New Hampshire;
Attorney for Petitioners.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 883

J. S. BUTNAM AND STANLEY M. BURNS, EXECUTORS OF THE ESTATE OF ABRAHAM BURTMAN,

Petitioners,

vs.

STATE OF NEW HAMPSHIRE

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

Preliminary Statement

The statement of the matter involved, jurisdiction, the constitutional provisions involved, and the question presented appear in the Petition for a Writ of Certiorari herein and in the interest of brevity are incorporated here by reference.

II

Argument

The New Hampshire Inheritance Tax Law as construed and applied by a majority of the New Hampshire Supreme Court is unconstitutional since it amounts to a

taking of property without due process of law and a denial of the equal protection of the laws in violation of the Fourteenth Amendment of the United States Constitution.

The New Hampshire inheritance tax is a tax on the privilege of inheritance. It is a tax on the right to succeed to property passing by will or inheritance. *Carter* v. *Craig,* 77 N. H. 200, 205 (90A.598); *Williams* v. *State,* 81 N. H. 341, 355 (125 A. 661); *Caskey* v. *State,* 93 N. H. 438, 442 (43 A(2) 768); *State* v. *Haley,* 94 N. H. 69, 73 (45 A(2) 533). It is not a tax on the estate of the decedent. It becomes a lien on the legacy. R. L., c. 87, s. 52. The executor is required to deduct the tax from the legacy before paying it over to the legatee. R. L., c. 87, s. 54. The burden of the tax falls on the legatee or person entitled to succeed to the property.

In the case at bar the One Hundred Thousand Dollar ($100,000) compromise payment was made to the widow by the executors. It was a compromise settlement of her claim against the estate. This amount never came into the hands of the residuary legatees. It was paid out by the executors before the legatees acquired any right to it. The residuary legatees did not participate in the settlement negotiations and they had no control over the compromise made by the executors.

The will of Abraham Burtman authorized the executors to execute this compromise agreement. The will, which is an exhibit in the case, states in its last paragraph:

> "I further authorize, direct and empower said executors to compromise, adjust, or arbitrarte any matter and pay any debt upon such evidence as they deem sufficient and upon such terms and in such manner as to them, in their absolute discretion, may seem reasonable and advisable."

The will shows that it was the intent of the testator to leave the matter of adjustment of claims against the estate solely in the hands of the executors. By making the compromise settlement the executors were carrying out the testator's intent. By the terms of the will itself the legatees had no claim against any assets that the executors chose to use to pay out to compromise claims against the estate.

The compromise payment to the widow was made by the executors in accordance with the opinion of the New Hampshire Supreme Court in *Burtman* v. *Butman*, 94 N. H. 412, 54 A (2) 367. In that case the widow brought a bill in equity for specific performance of the compromise agreement. The petition was brought against the executors alone. Legatees under the will were not parties to the action. The Court held that the compromise agreement was valid and enforceable, if it was reasonable and beneficial to the estate. The Probate Court later found that the agreement was reasonable and beneficial to the estate. No requirement was made by that decision that the assent of the residuary legatees was necessary to the settlement. The case holds that the settlement was one which the executors had the power to make by themselves alone and which they were obligated to carry out.

At the death of the testator the title to his personal property passed to the executors. The legatees under the will had no title to it. Their right was only to share in the assets remaining in the hands of the executors after payment of the debts and expenses of administration. *Barrett* v. *Cady*, 78 N. H. 60, 64 (96 A. 325). The settlement to the widow was paid from the personal property left by the testator. Had the One Hundred Thousand Dollars ($100,000) been used to pay a debt of the testator, an inheritance tax could not have been charged on it. The

executors had authority under the will to use this property to pay any claim asserted against the estate. They exercised this authority over this property while it was in their hands and before the legatees acquired any right to it. It cannot be said that the residuary legatees ever succeeded to the One Hundred Thousand Dollars ($100,000) by will or by inheritance. It may also be pointed out that the One Hundred Thousand Dollar ($100,000) payment can be considered to be an expense of administration. In this view of the matter no inheritance tax could be assessed against it. R. L., c. 87, s. 37.

The Fourteenth Amendment to the United States Constitution prohibits an inheritance tax which is arbitrary, unreasonable and unequal. *Magoun* v. *Illinois Trust and Savings Bank*, 170 U. S. 283, 300; *Campbell* v. *California*, 200 U. S. 87; *Keeney* v. *New York*, 222 U. S. 524; *Schlesinger* v. *Wisconsin*, 270 U. S. 230; *Binney* v. *Long*, 299 U. S. 280.

In the case of *Schlesinger* v. *Wisconsin*, 270 U. S. 230, the Court declared unconstitutional a Wisconsin statute which created a conclusive presumption that all gifts made within six years of death were made in contemplation of death. It was held that there was no adequate basis for creating this classification. It was there said at p. 240:

> "The presumption and consequent taxation are defended upon the theory that, exercising judgment and discretion, the Legislature found them necessary in order to prevent evasion of inheritance taxes. That is to say, A. may be required to submit to an exactment forbidden by the Constitution if this seems necessary in order to enable the state readily to collect lawful charges against B. Rights guaranteed by the federal Constitution are not to be so lightly treated; they are superior to this supposed necessity. The state is forbidden to deny due process of law or the equal protection of the laws for any purpose whatsoever."

The United States Supreme Court in *Binney* v. *Long*, 299 U. S. 280, considered the validity of a provision of the Massachusetts Inheritance Tax Law. This provision taxed beneficiaries who took property at the death of a donee of a power of appointment. If the power of appointment had been created prior to 1907, the beneficiaries were taxed. If it had been created after 1907 they were not taxed. The Court held that there was no sound basis for distinguishing between the two cases and that the statute so applied was arbitrary and unreasonable. The Court stated at page 292:

> "In view of the hostile discrimination against a class of remaindermen arbitrarily singled out for taxation from all those similarly situated, we are bound to hold the statutes deny the equal protection of law in contravention of the Fourteenth Amendment."

This decision reversed a decision of the Massachusetts Supreme Judicial Court.

In *Coolidge* v. *Long*, 282 U. S. 582 the Court held it was unconstitutional to give an inheritance tax a retroactive effect so as to make it applicable to transfers completed before passage of the law.

In *Stebbins* v. *Riley*, 268 U. S. 137, it was decided that the taxing statute may create classifications provided that all persons subject to the legislation within the classification must be rested upon some ground of difference having a fair and substantial relation to the object of the legislation. In *Keeney* v. *New York*, 222 U. S. 525, 536, it was said that there can be no arbitrary and unreasonable discrimination.

Discrimination by taxing authorities against a particular taxpayer cannot be upheld. A taxpayer taxed on the full value of his property while others are taxed only on partial value has justifiable cause for complaint. The

intentional systematic undervaluation by state officials of other property in the same class contravenes the constitutional rights of one taxed on the full value of his property. *Sioux City Bridge Co.* v. *Dakota County, Neb.*, 260 U. S. 441; *Cumberland Coal Co.* v. *Board of Revision, etc.*, 284 U. S. 23.

In the case at bar the residuary legatees have suffered an arbitrary and unreasonable discrimination. As Chief Justice Branch said in his dissenting opinion:

> "The injustice of the result reached in the majority opinion stands out clearly when it is noted that the residuary legatees are required to pay a legacy tax on the sum of $622,617.98, whereas they will receive from the estate only $522,617.98. Prior decisions of this Court clearly indicate that this cannot be done." In re Burtman's Estate, 63 A(2) 798, 800.

The residuary legatees have been taxed for property which they did not receive; over which they had no power of control; and in which they never acquired any right, title, or interest. The order of the New Hampshire Supreme Court results in taking property from them without due process of law and in violation of the equal protection of the laws. The tax levied on the $100,000 compromise payment made to the widow is unconstitutional as a violation of the Fourteenth Amendment.

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY M. BURNS,
Strafford Bank Building,
Dover, New Hampshire.

FILE COPY

Supreme Court, U.S.
FILED
AUG 11 1949
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948

No. 883 136

J. S. BUTNAM and STANLEY M. BURNS, Executors
OF THE ESTATE OF ABRAHAM BURTMAN
Petitioners

v.

THE STATE OF NEW HAMPSHIRE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW HAMPSHIRE

RESPONDENT'S BRIEF
OPPOSING JURISDICTION

ERNEST R. D'AMOURS
795 Elm Street
Manchester,
New Hampshire

WILLIAM L. PHINNEY
Attorney General

WILLIAM S. GREEN,
Assistant Attorney General
State House
Concord, New Hampshire

Counsel for Respondent

INDEX

SUBJECT INDEX

PAGE

Argument 2

Summary and Statement of Objections to the Jurisdiction 2

I. The method of determining the tax is a reasonable and proper regulation of the privilege of inheritance 2

II. The New Hampshire inheritance tax law as construed by the New Hampshire Supreme Court does not violate either the due process clause or the equal protection clause of the 14th Amendment to the Constitution of the United States 5

III. No substantial federal question is presented in the case at bar 8

Table of Cases Cited

PAGE

Baxter v. *Treasurer and Receiver General*, 209 Mass. 459, 462-463, 95 N.E. 854, 856 (1911) 4

Bell's Gap R. Co. v. *Pennsylvania*, 134 U.S. 232, 237, 10 S. Ct. 533, 535, 33 L. Ed. 892, 895 (1890) 7

Carter v. *Craig*, 77 N. H. 200, 90 Atl. 509 (1914) 5

Central Hanover Bank and Trust Co. v. *Kelly, State Tax Commissioner*, 319 U.S. 94, 63 S. Ct. 945, 87 L. Ed. 1282 (1943) 6, 8

City of Louisville v. *Cumberland Tel. and Tel. Co.* 155 Fed. 725 (1907) 10

Equitable Life Assurance Society of the United States v. *Brown*, 187 U.S. 308, 311, 23 S. Ct. 123, 125, 47 L. Ed. 190, 192 (1902) 8

Herndon v. *Georgia*, 295 U.S. 441, 443, 55 S. Ct. 794, 795, 79 L. Ed. 1530, 1532 (1935) 9

Honeyman v. *Hanan*, 300 U.S. 14, 18-19, 57 S. Ct. 350, 352, 81 L. Ed. 476, 479 (1937) 9

In Re Estate Abraham Burtman, 95 N. H. 383, 63 A. 2d 798 (1949) 3, 5, 6

Kimball v. *Badger*, 93 N. H. 345, 42 A. 2d 1 (1945) 5

Magoun v. *Illinois Trust and Savings Bank*, 170 U.S. 283, 300, 18 S. Ct. 594, 601, 42 L. Ed. 1037, 1045 (1898) 6, 7

Manhattan R. Co. v. *City of New York*, 18 Fed. 195 (1883) 10

Orr v. *Gilman*, 183 U.S. 278, 290, 22 S. Ct. 213, 218, 46 L. Ed. 196, 203 (1902) 8

People v. *Union Trust Co.*, 255 Ill. 168, 99 N.E. 377 (1912) 4

Pennsylvania Hospital v. *Philadelphia*, 245 U.S. 20, 38 S. Ct. 35, 62 L. Ed. 124 (1917) 8

Salomon v. *State Tax Commission*, 278 U.S. 484, 490, 49 S. Ct. 192, 195, 73 L. Ed. 464, 469 (1929) 6, 8

Stebbins v. *Riley*, 268 U.S. 137, 140-141, 45 S. Ct. 424, 425, 69 L. Ed. 885, 888 (1925) 3, 7

Statutes Cited

Page

Revised Laws of New Hampshire (1942) Chapter 87, Section 1, as amended by Laws of 1945, Chapter 144 2

Revised Laws of New Hampshire (1942) Chapter 87, Section 33, as amended by Laws of 1945, Chapter 144 2

Texts Cited

Kidder: "State Inheritance Tax and Taxability of Trusts" 4

Law Review Articles Cited

33 Harvard Law Review 556, 574 (Warren: The Progress of The Law, 1918 - 1919; Wills and Administration) 3

Annotations Cited

137 A.L.R. 665 4

78 A.L.R. 716 4

Supreme Court of the United States

OCTOBER TERM, 1948

No. 883

J. S. BUTNAM and STANLEY M. BURNS, Executors
OF THE ESTATE OF ABRAHAM BURTMAN
Petitioners,

v.

THE STATE OF NEW HAMPSHIRE,
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF
NEW HAMPSHIRE

RESPONDENT'S BRIEF OPPOSING JURISDICTION

Pursuant to Rule 38, Paragraph 3, Rules of the Supreme Court of the United States, comes now The State of New Hampshire, respondent, and discloses the following material in opposition to the Petition for a Writ of Certiorari, including certain objections to the jurisdiction of the Court as permitted under Rule 7, Paragraph 3 of said Rules.

ARGUMENT

Summary

The issue presented is whether the State of New Hampshire, under its inheritance tax law, may properly include a compromise payment by the executors to the testator's widow in the taxable estate. This is a matter entirely for the state courts since this Court has long held that where, as in this case, the rules of transmission and devolution of property passing as a result of death adopted by the state are reasonable and all persons subject to such rules are treated with equality under similar circumstances, no federal question is presented.

I. The method of determining the tax is a reasonable and proper regulation of the privilege of inheritance.

The New Hampshire inheritance tax statute provides that:

> "All property within the jurisdiction of the state, real or personal, and any interest therein, belonging to domiciliaries of the state, . . . which shall pass by will, or by the laws regulating intestate succession, . . . to any person, absolutely or in trust, except to or for the use of the husband, wife, father, mother, lineal descendant, or adopted child of a decedent, . . . shall be subject to a tax of eight and one-half per cent of its value, for the use of the state." Revised Laws of New Hampshire (1942), Chapter 87, section 1, as amended by Laws of 1945, chapter 144, section 1.

Section 33 of the same chapter enacts that:

> "Said tax shall be assessed upon the actual market value of the property at the time of the decedent's death, and gains or losses on sales made afterward for any purpose shall be disregarded, except as evidence of true value at time of death. Such value shall be determined by the assistant attorney general and notified by him to the person or persons by whom the tax is payable, and such determination shall be final unless the value so determined shall be reduced by proceedings as herein provided."

Paragraph 33rd of the will of the testator directs the executors "to pay all taxes . . . on the bequests and against the legatees named in the will, out of the residue of my estate . . ."

The petitioners assert that the due process and equal protection clauses of the 14th Amendment to the Constitution of the United States are violated if they are obliged to pay a tax based on an amount larger than that actually received by the residuary legatee.

> ". . . it has been repeatedly held by this Court that the power of testamentary disposition and the privilege of inheritance are subject to state taxation and state regulation, and that regulatory taxing provisions, even though they produce inequalities in taxation, do not effect an unconstitutional taking of property, unless, . . . the taxing statute 'results in such flagrant and palpable inequality between the burden imposed and the benefit received, as to amount to the arbitrary taking of property without compensation,—to spoliation under the guise of exerting the power of taxing.'" *Stebbins* v. *Riley*, 268 U. S. 137, 140-141, 45 S. Ct. 424, 425, 69 L. Ed. 885, 888.

The State of New Hampshire has assessed the tax in this case according to the manner of transmission directed by the will of the testator and has refused to deduct from the taxable estate the $100,000 paid to the widow as a result of her compromise settlement with the petitioners. The Supreme Court of New Hampshire has ruled this a proper assessment. *In Re Estate Abraham Burtman*, 95 N. H. 383, 63A. 2d 798. The reasons for adopting this method of assessment rest on both legal and practical grounds. These grounds have been stated cogently in 33 Harvard Law Review, 556, 574 (Warren: The Progress of The Law, 1918 - 1919; Wills and Administration):

> "the . . . doctrine . . . which taxes the estate according to the terms of the will and not according to the provisions of the agreement, is preferable. It is true that a legatee may renounce, and if he does, the legacy is not taxable to him but to the residuary legatee; and if he may renounce in part, escape the burden and let the person who actually receives the property pay the tax. But in renunciation, as in the case of lapsed or void legacies, the law of wills or the intestate law—not the agreement of the parties—carries the property to the person taxable."

The author goes on to say that a doctrine approving taxation in accordance with compromise agreements entered into subsequent to the will "lays the foundation for collusive agreements to deprive the government of its just due." See Annotations 137 A.L.R. 665; 78 A.L.R. 716; See also *People* v. *Union Trust Co.*, 255 Ill. 168, 99 N. E. 377.

Other authorities on this question are collected and discussed in Kidder, State Inheritance Tax and Taxability of Trusts at 28, where the author comments as follows:

> "This question has been litigated in several states, and the great weight of authority holds that successions in such cases shall be taxed only in the manner as provided by the will and not in accordance with an agreement subsequently entered into among the heirs and beneficiaries. . . . to permit the heirs, legatees and parties interested in an estate to change by agreement among themselves, after the death of a testator or decedent, the proportionate amounts of the property on which the respective beneficiaries should pay an inheritance tax, might, in some instances, practically deprive the state of all power of collecting any inheritance tax; the rights of the state to the inheritance tax are fixed as of the date of death of a decedent, and those rights cannot be annulled or abridged by any subsequent agreement between the parties interested in the estate of the decedent."

A successful contest of the will would have defeated the testator's intentions and left his property to be disposed of according to the laws of intestacy, but when the will was probated his intentions therein were upheld and made certain of performance. The additional $100,000 ultimately paid to the widow in settlement was part of the property which passed by the will and the will stands as it was executed. Nor does the approval of the compromise agreement by the Strafford County Probate Court vary the case. As quoted in *Baxter* v. *Treasurer and Receiver General*, 209 Mass. 459, 462-463, 95 N. E. 854, 856:

> " 'The agreement for compromise did not become a part of the will. Although the practice is to insert a clause in the decree to the effect that the estate shall be administered in accordance with the agreement for compromise established thereby, yet the rights of the parties growing out of the agreement rests upon it and the decree confirming it, and

> are not testamentary rights' . . . For reasons hereinbefore stated the amount of the tax is not changed by the fact that the agreement was approved by the court . . ."

It is apparent therefore that the method of tax assessment adopted by the state is neither arbitrary nor unreasonable. Rather, it is formulated, in accordance with the foregoing principles of law, to satisfy the practical requirements of expeditious assessments and collection of the tax and to obstruct possible frauds upon the state.

II. The New Hampshire inheritance tax law as construed by the New Hampshire Supreme Court does not violate either the due process clause or the equal protection clause of the 14th Amendment to the Constitution of the United States.

The petitioners strongly emphasize that the tax base here employed by the state is broader than the value of the property to be distributed to the residuary legatee and that the burden of the tax falls upon that legatee. They imply that the result derived in this case by the Supreme Court of New Hampshire is inconsistent with earlier decisions of that Court and argue that denial of due process of law and inequality result from the alleged inconsistency. However, they appear not to recognize that the question now presented, being one of first impression in New Hampshire, required re-examination of the pertinent statutes and new construction thereof. They also appear to have overlooked or minimized decisions of that Court declaring legislation constitutional which is designed to prevent reductions in the taxable value of legacies or distributive shares and to defeat devices which may be used to defraud the state of inheritance taxes. *Kimball* v. *Badger*, 93 N. H. 345, 42 A. 2d 1; *Carter* v. *Craig*, 77 N. H. 200, 90 Atl. 509. No earlier New Hampshire inheritance tax case has dealt with a problem involving a redistribution of assets in the manner employed here. As the Supreme Court of New Hampshire has said in this case:

> "Here we are concerned with a voluntary re-distribution of the assets of the estate . . ." *In Re Estate Abraham Burtman*, supra, 385.

In this situation, the state argues that it is not obliged to consider the effect of such a re-distribution in computing the taxable value of the re-distributed property.

The fact that the residuary legatee did not participate in the compromise settlement is of no avail to the petitioners. The reasons for the tax base employed by the state prevail regardless of which interested parties did so participate, and under Paragraph 33rd of the testator's will all inheritance taxes are payable from the residue. No denial of due process of law results from thus basing the tax upon the value of the property passing by will, rather than upon the value of the property to be received by the residuary legatee.

> "The due process clause places no restriction on a state as to the time at which an inheritance tax shall be levied or the property valued for purposes of such tax." *Salomon* v. *State Tax Commission,* 278 U.S. 484, 490, 49 S. Ct. 192, 195, 73 L. Ed. 464, 469; *Central Hanover Bank and Trust Co.* v. *Kelly, State Tax Commissioner,* 319 U.S. 94, 63 S. Ct. 945, 87 L. Ed. 1282.

The position thus stated by this Court is strengthened when it is noted that in neither of the cited cases was there any opportunity for the parties to avoid the consequences of the tax. In a case like that at bar, adjustment of any tax inequities resulting from the compromise may be adjusted in the agreement of the parties and this possibility is recognized in the opinion of the Supreme Court of New Hampshire. *In Re Estate Abraham Burtman,* supra, 385.

Reliance is placed by the petitioners upon the statement in *Magoun* v. *Illinois Trust and Savings Bank,* 170 U.S. 283, 300, 18 S. Ct. 594, 601, 42 L. Ed. 1037, 1045 that the 14th Amendment requires that the law imposing the tax "shall operate on all alike under the same circumstances," to demonstrate that unreasonableness and inequality arise from the method of assessment used in this case. But in the *Magoun* case it was also stated, at 296, that:

> "There is therefore no precise application of the rule of reasonableness of classification and the rule of equality permits many practical inequalities. And necessarily so.

> In a classification for governmental purposes there cannot be an exact exclusion or inclusion of persons and things."

The residuary legatee under Mr. Burtman's will has not been separately classified nor discriminated against in the present case. The State of New Hampshire has decided simply that compromise payments are within the taxable estate. Stated otherwise, the state does not allow compromise payments as an inheritance tax deduction. This Court has expressly held that the Constitution of the United States permits a state to allow deductions from its inheritance tax or not to allow them, for "such regulations, so long as they proceed within reasonable limits and general usage are within the discretion of the state legislature or the people of the state in framing their Constitution." *Bell's Gap R. Co.* v. *Pennsylvania,* 134 U. S. 232, 237, 10 S. Ct. 533, 535, 33 L. Ed. 892, 895; *Stebbins* v. *Riley,* supra. Any burdens resulting from the decision of the Supreme Court of New Hampshire in this case falling upon the residuary legatee are entirely incidental. Compromise payments, not beneficiaries, have been classified and the petitioners' argument that the residuary legatee is being discriminated against because it is not being taxed equally with others in the same class as itself since it is required to pay a higher tax than other legatees receiving the same amount from the same size estate, must fail.

The petitioners have not properly applied the *Magoun* case test which they rely upon. The pertinent inquiry under that case is whether the residuary legatee is paying the same tax that other legatees would pay upon receiving the same amount from the same size estate "under the same circumstances."

> "The guaranty of the 14th Amendment of the equal protection of the laws is not a guaranty of equality of operation or application of state legislation upon all citizens of a state." *Stebbins* v. *Riley, supra,* 142.

Until the petitioners can show that other legatees have been or will be allowed to deduct compromise payments similar to that made in this case, they may allege no inequality and no discrimination. Any claim of discrimination resting upon any hardship incurred by the residuary legatee from the present assess-

ment is countered by Mr. Justice Brandeis in *Salomon* v. *State Tax Commission, supra,* at 491, 492:

> "To all such objections it may be answered that minor inequalities and hardships are incidents of every system of taxation and do not render the legislation obnoxious to the Federal Constitution."

III. No substantial federal question is presented in the case at bar.

It is apparent from the foregoing statements of law that the questions raised by the petitioners concerning the application of the New Hampshire inheritance tax law, as construed by the Supreme Court of New Hampshire, have been unequivocally answered by this Court several times and must now be deemed foreclosed.

> ". . . although . . . it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal . . . or has been so explicitly foreclosed by a decision or decisions of this Court as to leave no room for real controversy, the motion to dismiss will prevail." *Equitable Life Assurance Society of the United States* v. *Brown,* 187 U. S. 308, 311, 23 S. Ct. 123, 125, 47 L. Ed. 190, 192; *Pennsylvania Hospital* v. *Philadelphia,* 245 U. S. 20, 38 S. Ct. 35, 62 L. Ed. 124.

Under these circumstances, this Court is bound by the construction placed upon the New Hampshire inheritance tax law by the Supreme Court of New Hampshire.

> "The subject dealt with is one of state law expounded by state courts. All the laws and the construction put upon them apply equally to all persons in a like situation and cannot be regarded as conflicting with the provisions of the Federal Constitution." *Orr* v. *Gilman,* 183 U. S. 278, 290, 22 S. Ct. 213, 218, 46 L. Ed. 196, 203; *Central Hanover Bank and Trust Co.* v. *Kelly, State Tax Commissioner, supra.* "It has never been held that it was the purpose or function of [the 14th Amendment] to change the systems and policies of the states in regard to the devolution of estates or to the extent of the taxing power over them." *Orr* v. *Gilman, supra,* 286.

It is further submitted that the petitioners did not raise a federal question seasonably. Careful study of the petitioners' brief before the New Hampshire Supreme Court upon transfer of the question does not reveal the slightest indication that any federal question was posed, nor in any federal question discussed in the Opinion of the New Hampshire Supreme Court. Such a question is suggested for the first time in the petition for rehearing, addressed to the Supreme Court of New Hampshire.

> "The long established general rule is that the attempt to raise a federal question after judgment, upon a petition for rehearing, comes too late unless the court actually entertains the question and decides it." *Herndon* v. *Georgia*, 295 U. S. 441, 443, 55 S. Ct. 794, 795, 79 L. Ed. 1530, 1532.

The petition for rehearing was denied without argument or opinion. The only reference to the Constitution of the United States appears in the certificate issued by the Chief Justice of the New Hampshire Supreme Court. This certificate does not cure petitioners' error in failing to raise a federal question at the time the case was heard. As Chief Justice Hughes said in *Honeyman* v. *Hanan*, 300 U. S. 14, 18-19, 57 S. Ct. 350, 352, 81 L. Ed. 476, 479:

> "Before we may undertake to review a decision of the court of a state it must appear affirmatively from the record, not only that the Federal question was presented for decision to the highest court of the state having jurisdiction but that its decision of the Federal question was necessary to the determination of the cause . . . Whether these requirements have been met is itself a Federal question. As this Court must decide whether it has jurisdiction in a particular case, this Court must determine whether a Federal question was necessarily passed upon by the state court. That determination must rest upon an examination of the record. A certificate or statement by the state court that a Federal question has been presented to it and necessarily passed upon is not controlling. While such a certificate or statement may aid this Court in the examination of the record, it cannot avail to foreclose the inquiry which it is our duty to make or to import into the record a Federal question which otherwise the record wholly fails to present."

The State submits that a federal question was not necessarily decided by the Supreme Court of New Hampshire because the well established principles heretofore stated enabled that Court to rest the decision in this case upon other than federal grounds. See, *Manhattan R. Co.* v. *City of New York*, 18 Fed. 195; *City of Louisville* v. *Cumberland Tel. and Tel. Co.*, 155 Fed. 725.

For the reasons above stated, it is respectfully submitted by the respondent State of New Hampshire that the petition for a writ of certiorari should be denied and that the writ should not issue.

Respectfully submitted,

ERNEST R. D'AMOURS
795 Elm Street
Manchester,
New Hampshire

WILLIAM L. PHINNEY,
Attorney-General

WILLIAM S. GREEN,
Assistant Attorney General
State House
Concord, New Hampshire

Counsel for Respondent